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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARK FUDGE,

Petitioner and Appellant,

v.

CALIFORNIA COASTAL  
COMMISSION, et al.,

Respondents.

B268824

(Los Angeles County  
Super. Ct. No. BS154300)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Richard L. Fruin, Jr., Judge. Affirmed.

Morrison & Foerster, Miriam A. Vogel and Peter Hsiao for Petitioner  
and Appellant.

Rutan & Tucker and Philip D. Kohn for Respondents City of Laguna  
Beach, Laguna Beach City Council, Laguna Beach Planning Commission and  
Anne Johnson.

Richards, Watson & Gershon, Steven H. Kaufmann and Ginetta L.  
Giovinco for Real Party in Interest Laguna Beach Golf and Bungalow Village,  
LLC.

Petitioner and appellant Mark Fudge filed a petition for writ of mandate (Code Civ. Proc., § 1094.5) against the City of Laguna Beach, among others, several months after the City’s planning commission found a developer’s proposed commercial project exempt from environmental impact review and other requirements under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. (CEQA)). The trial court found the developer’s claims time-barred as to the City, and its collateral claims for declaratory and injunctive relief barred as a matter of law. The City’s demurrer was sustained without leave to amend. We affirm.

## FACTUAL BACKGROUND

Aliso Canyon is an area located within respondent City of Laguna Beach.<sup>1</sup> Aliso Canyon is a biologically diverse coastal area, across from Aliso Beach in a canyon bisected by Aliso Creek, a designated blue line stream, and surrounded by a nature preserve and environmentally sensitive habitat. In 2013, real party in interest, Laguna Beach Golf and Bungalow Village, LLC (Developer) purchased an 84-acre parcel of property in Aliso Canyon. That parcel, commonly referred to as “the Ranch,” was originally developed in the 1950s and 1960s and contained an existing hotel, restaurant and a nine-hole golf course. The property purchased by Developer is near Aliso Canyon property owned by appellant. Developer proposed to renovate the Ranch’s

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<sup>1</sup> The other City of Laguna Beach–affiliated respondents are the Laguna Beach City Council (City Council), and the Laguna Beach Planning Commission (Planning Commission) and its former Chair, Anne Johnson (collectively, City).

existing structures, and to add additional facilities and amenities (the project). The project was to be implemented in several phases.<sup>2</sup>

Only phase 2 of the project is at issue here. That phase involves remodeling and expansion of the existing hotel, dining, retail and golf course facilities, including the addition of 33 hotel rooms, construction of a spa and fitness center, employee lounge, accessory structures, new building facades, and modification of existing assembly areas. In March 2014, Developer applied to the Planning Commission for a coastal development permit (CDP), conditional use permit (CUP) and design review permit (DRP) necessary to undertake this phase of the project.<sup>3</sup>

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<sup>2</sup> The first phase of the project proceeded after the City issued a December 2013 permit to demolish some of the hotel.

<sup>3</sup> The City has a certified Local Coastal Program (LCP), and direct jurisdiction over the permit application under for the California Coastal Act, section 30000 et seq. (Coastal Act) for coastal development within the City. (See *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 272 [Coastal Act sets minimum standards and policies for local governments to follow in developing land use plans, but gives the locality wide discretion to determine the contents of such plans].) The Coastal Commission was created under the Coastal Act as part of a comprehensive planning process for property development within the State’s “coastal zones.” (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565.) Generally speaking, the Coastal Act delegates the power to issue a CDP to a local (“lead”) agency, such as the City here, with the Coastal Commission exercising appellate jurisdiction. (§§ 30519, 30600.5.) All further undesignated statutory references are to the Public Resources Code.

“Anyone who wants to build on his own coastal zone property must obtain a [CDP]. (§ 30600, subd. (a).) The application for a [CDP] must be submitted either to the Coastal Commission or to the local governmental agency . . . , depending upon which entity has permitting jurisdiction — which, in turn, depends upon whether the local governmental agency has obtained the Coastal Commission’s certification of a . . . LCP. If, as here, a

On May 14, 2014, the Planning Commission conducted a public hearing and voted to approve the Developer's application as to the CDP (CDP No. 14-573), CUP (CUP No. 14-574), and DRP (DRP No. 14-575). The Planning Commission determined the project was exempt from CEQA because of administrative guidelines exempting construction of new and conversion of existing small structures. (Cal. Code Regs., tit. 14, § 15303, subd. (c).) On May 23, 2014, the City publicly recorded a Notice of Exemption with the Orange County Clerk, categorically exempting the project pursuant to California Code of Regulations., title 14, section 15303, subdivision (c).

On June 16, 2014, appellant filed an appeal with the Coastal Commission regarding the portion of the Planning Commission's determination relating only to approval of the CDP.<sup>4</sup> A June 27, 2014 report

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local governmental agency has obtained certification of its LCP, the local agency becomes the permitting authority. (§ 30600, subd. (d).)" (*Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1163, fn. omitted.)

<sup>4</sup> During oral argument, appellant vigorously asserted that his appeal to the Coastal Commission included the Planning Commission's approval of the entire project, not just the CDP. His only support for that claim, however, included references to two definitional sections in the LBMC, only one of which was included in his appellate briefs, and then only in relation to a phase of the project not at issue here. (See LBMC, § 25.07.006, subds. (C), (D).) In any event, neither section of the LBMC to which appellant referred at oral argument advances his case. Appellant was unable to point to any evidence to support his claim that his appeal to the Coastal Commission included any permit other than the CDP. Further, a number of references in the staff report appended to the complaint make it abundantly clear that only the CDP was at issue in the Coastal Commission administrative appeal. Specifically, that report notes that the Coastal Commission received final notice of the City's action on CDP No. 14-573 on June 2, 2014, and assigned Appeal No. A-5-LGB-14-0034 to the appeal of that permit. The report also

by the Coastal Commission staff noted the appeal raised “a substantial issue” regarding the “consistency” between the project as approved by the City (the lead agency for purposes of CEQA), and the LCP. However, the staff report also noted that the Coastal Commission lacked the “authority to review [the City’s] CEQA determination for purposes of establishing whether or not [that] determination is consistent with CEQA—the proper avenue for such a determination lies with filing a lawsuit challenging the [City’s] CEQA determination.”

At a public hearing conducted on July 9, 2014, the Coastal Commission concluded there was “a lack of factual support” for the categorical CEQA exemption upon which the Planning Commission relied. The Coastal Commission found that substantial issues required it to conduct a de novo review regarding the project’s compliance with the LCP. However, consistent with its staff report’s recommendations, the Coastal Commission also found that it lacked jurisdiction to review the lead agency’s CEQA determination.<sup>5</sup>

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notes that “[n]o other appeals were received.” Indeed, the report points out that no appeal but an appeal of the CDP would have been permitted.

<sup>5</sup> Appellant alleged that the Coastal Commission was wrong and that the Commission was required to grant the appeal, conduct the review and remand the matter.

The Coastal Commission conducted a de novo review of the CDP on January 8, 2015. In a December 23, 2014 report prepared in advance of that hearing, the Coastal Commission staff concluded that the project would intensify existing use of the Ranch property and required mitigation under the LCP and the Coastal Act. However, the staff also recommended that the CDP be approved subject to the Coastal Commission’s imposition of certain conditions.

At the January 2015, hearing, the Coastal Commission found that, with the imposition of additional conditions, the project was consistent with CEQA, and there were no feasible alternatives or mitigation measures

## PROCEDURAL BACKGROUND

Appellant filed the instant action on March 5, 2015. Three causes of action—the only claims at issue here—were alleged against the City: the first cause of action alleges a violation of CEQA in connection with the Planning Commission’s determination that the CDP was exempt from CEQA; the third cause of action alleges the City violated the LBMC in connection with the Planning Commission’s approval of the project; and the fourth “cause of action” seeks declaratory and injunctive relief.<sup>6</sup> The same claims were also alleged against the Coastal Commission and Developer, which and who are not parties to this appeal (although the Developer, as real party in interest, submitted a brief).

Each defendant demurred. As relevant here, the City demurred to the first, third and fourth causes of action on the ground that appellant failed to state facts sufficient to constitute a viable cause of action, in that the first and third causes of action were time-barred, and the fourth cause of action was barred as a matter of law. (Code Civ. Proc., § 430.10, subd. (e).) The Developer’s demurrer to the first and fourth causes of action was premised on

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available to substantially lessen any significant adverse environmental impacts. The Commission rejected Fudge’s appeal and other objections to the project and approved the CDP, finding it consistent with the LCP. On April 15, 2015, the Coastal Commission conducted a further hearing to consider, approve and issue revised findings regarding its final approval of the CDP on January 8, 2015.

<sup>6</sup> The second cause of action for violation of the Coastal Act, alleged only against the Coastal Commission and its Executive Director (collectively, Coastal Commission), is not at issue here.

the same grounds as the City's demurrer to those claims.<sup>7</sup> Each defendant filed a request for judicial notice, which the court granted. The City and Developer also filed a joint motion to dismiss the first cause of action, and portions of the third and fourth causes of action based on appellant's failure to comply with section 21167.4, subdivision (a).<sup>8</sup> That motion was subsequently deemed moot, and denied.

On September 22, 2015, after several months' delay,<sup>9</sup> the trial court issued a tentative ruling and conducted a hearing on the demurrers.<sup>10</sup> On November 4, 2015, the trial court issued its tentative ruling, conducted a continued hearing on the demurrers and took the matter under submission.

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<sup>7</sup> The City and Developer each demurred to the second cause of action, although neither was a defendant to that claim. The Developer did not demur to the third cause of action as to which it is a named defendant.

<sup>8</sup> Section 21167.4 requires that, in an action alleging a CEQA violation, the petitioner must file a written request for hearing within 90 days of the date the action is filed, or the action is subject to dismissal on the court's own motion or on a motion of any party interested in the action. (§ 21167.4, subds. (a)-(c); *County of Sacramento v. Superior Court* (2009) 180 Cal.App.4th 943, 950.)

<sup>9</sup> The delay resulted first from a challenge to the judge to whom the case was assigned (Code Civ. Proc., § 170.6), and then elevation of the judge to whom the case was reassigned to the Court of Appeal. The case was reassigned in July 2015 to the judge who ultimately ruled on the motions.

<sup>10</sup> At the hearing, the court observed that respondents' briefing deprived appellant of an opportunity to respond to a pivotal argument that the Coastal Commission's determination as to the CDP was final as of the date the Coastal Commission announced its findings on January 8, 2015, not months later in April 2015, when it revised those findings. The hearing was continued to permit appellant to submit a sur-reply.

The court entered a minute order on November 16, 2015, adopting as final its tentative ruling. The court granted respondents' requests for judicial notice, and sustained demurrers to the first, second and fourth causes of action without leave to amend. On December 1, 2015, the trial court entered an Order on the demurrers, motions to strike and to dismiss, and Judgment dismissing the action against the City. This timely appeal followed as to the City respondents.

## DISCUSSION

The principal issue on appeal is whether the court erred in finding that appellant's first and third causes of action were time-barred, and sustaining without leave to amend the City's demurrer to those claims. The answer to that question dictates resolution of the collateral question of the viability of appellant's cause of action for declaratory and injunctive relief.

We independently examine a judgment of dismissal after an order sustaining a demurrer without leave to amend to determine whether the complaint does or could be amended to allege facts sufficient to state a cause of action under any legal theory. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*)). We assume the truth of all facts properly pled, and accept as true ““all facts that may be implied or reasonably inferred from those expressly alleged. [Citation.]’ [Citation.] Further, we give the complaint a reasonable interpretation, and read it in context.” (*Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1026 (*Trinity*), disapproved on another ground by *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1209–1210.) The plaintiff bears the burden of demonstrating a reasonable possibility that any defect can be cured by amendment. (*Michael*

*Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1019.)

In determining whether to grant a demurrer, a trial court may consider matters that have been judicially noticed (*Trinity, supra*, 193 Cal.App.4th at p. 1026), and exhibits to the complaint. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400 (*Hoffman*).) A demurrer based on a statute of limitations will lie where the defect appears clearly and affirmatively on the face of the complaint. (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42; see also *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1421 [general demurrer will not ordinarily reach an affirmative defense, but “will lie where the complaint “has included allegations that clearly disclose some defense or bar to recovery””].) Thus, it follows that where an exhibit attached to the complaint, or matter of which judicial notice is properly taken, clearly demonstrates the statute of limitations has run, the trial court may grant a demurrer raising this affirmative defense. (See *Hoffman, supra*, 179 Cal.App.4th at p. 400.)

#### I. *The First and Third Causes of Action are Time-Barred*

In his first cause of action, appellant alleges that the Planning Commission violated CEQA when it found phase 2 of the project exempt from that act, based on what he alleged were inapplicable CEQA guidelines. (See Cal. Code Regs., tit. 14, § 15303, subd. (c).) Appellant concedes that the Planning Commission made this determination on May 14, 2014. On May 23, 2014, the City posted the requisite Notice of Exemption under CEQA with the Orange County Clerk. As relevant here, the third cause of action alleges the City violated the LBMC with regard to the consideration, public notice and hearing process for consideration of the permit for the proposed project.

“To ensure finality and predictability in public land use planning decisions, statutes of limitations governing challenges to such decisions are typically short.” (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 499.) In keeping with this express Legislative goal, the California Supreme Court has observed “that “the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted.” [Citations.]” (*Id.* at p. 500.) In determining that an abbreviated period for the filing and disposition of CEQA challenges to governmental decisions was in order, the Legislature clearly expressed its “concern that CEQA challenges, with their obvious potential for financial prejudice and disruption, must not be permitted to drag on to the potential serious injury of the real party in interest.” [Citation.]” (*Ibid.*) To that end, CEQA provides that any “action or proceeding alleging that a public agency has improperly determined that a project is not subject to [CEQA] shall be commenced within 35 days from the date of the filing by the public agency . . . of the notice [of exemption].” (§ 21167, subd. (d); *Committee for Green Foothills, supra*, 48 Cal.4th at pp. 47-48.)

Applied here, section 21167, subdivision (d) required that a timely challenge to the City’s actions under CEQA be filed no later than June 27, 2014. This action, filed on March 5, 2015, was about eight months too late. This incurable deficiency is fatal to appellant’s first cause of action.

A. *Appeal of Approval of the CDP to the Coastal Commission Did Not Stay the Statute of Limitations*

Appellant maintains the trial court erred in finding his claims barred by the statute of limitations because the City’s approvals of the CDP, CUP and DRP, and its finding that the project was exempt from CEQA were

collectively stayed by section 30623, pending his appeal to the Coastal Commission of approval of the CDP. He is mistaken.

Section 30623—which is part of the Coastal Act, not CEQA—provides: “[i]f an appeal of any action on any development by any local government . . . is filed with the commission, the operation and effect of *that action* shall be stayed pending a decision on appeal.” (Italics added.) As the trial court aptly observed, this statute has limited scope and is tied to the occurrence of a discrete event. Specifically, the “any action” to which it refers, and the only action over which the Coastal Commission had jurisdiction, was the City’s approval of the CDP. (See Cal. Code Regs., tit. 14, § 13320 [referring to § 30623, with specific reference to CDPs].) Appellant did not appeal, nor could he have appealed, the Planning Commission’s separate, independent determinations regarding the CUP and DRP approvals or CEQA exemption. The reference in section 30623 to “the operation and effect of that action” relates exclusively to an appeal taken from approval of the CDP.

*B. The LBMC Did Not Stay Challenges to the CUP, DRP or CEQA Determinations Pending Resolution of the Coastal Commission Appeal*

Appellant maintains that the trial court erred because the practical effect of its ruling requires that one in his position be put to the expense and inconvenience of having to pursue “two simultaneous adversary proceedings, one in court and one before the Coastal Commission, to challenge the identical violation of CEQA.” He maintains that, although the trial court ignored this argument below, the City has acknowledged the potential financial and other burdens posed by such duplicative adversarial challenges—one in court and the other before the Coastal Commission—to the same CEQA violation by the same agency for the same project.

Accordingly, appellant asserts that the City enacted ordinances precisely to avoid those burdens to stay collateral challenges to CUP and DRP permits pending resolution of a Coastal Commission appeal.

Specifically, appellant claims that LBMC section 25.07.014(D)(1)(a) provides that a local decision approving a CDP, whether rendered by the Planning Commission or City Council, is not effective if appealed to the Coastal Commission. He also argues that the same rule applies to decisions as to a CUP and DRP. (LBMC, §§ 25.05.030, subd. (H), 25.05.070, subd. (B)(1), 25.05.040, subd. (I), 25.05.070, subds. (B)(1), (B)(9)(g).) As a result, appellant insists none of the City's decisions here—whether to grant the CUP or DRP or to exempt the project from CEQA—went into effect once he filed his appeal with the Coastal Commission pursuant to LBMC section 25.07.016.

There are several problems with this argument. First, LBMC section 25.07.014, subdivision (D)(1)(a) does not stay the 35-day statute of limitations under section 21167, subdivision (d) for challenging the CEQA exemption. Rather that provision of the LBMC stays a decision approving a CDP if the decision is appealed to the Coastal Commission. It does not address the separate issue of the effective date of a CEQA determination for purposes of a legal challenge to that decision. Further, the Planning Commission's approval of the CDP—which is not directly at issue here—was supplanted by the Coastal Commission once the Coastal Commission assumed jurisdiction over the administrative appeal.

Second, appellant's reliance on LBMC sections 25.05.030, 25.05.040 and 25.05.070 is misplaced. None of those provisions suspends the effective date of an approval of a CUP or DRP, nor do they address a CEQA challenge. Rather, these provisions of the LBMC state only that approval of a CUP or

DRP application become effective in 10 or 14 days, respectively, unless appealed to the City Council. (See LBMC, §§ 25.05.030(I)(1), 25.05.040(J)(1).) Fudge chose not to appeal the CUP or DRP approvals to the City Council.

Third, although, as the City concedes, appellant had no obligation to appeal the CDP decision to the City Council (because a fee is charged for such appeals; LBMC section 25.07.016, subd. (A)(3)), that exemption applies only to a determination as to the CDP. It does not bear upon the CEQA exemption, or CUP or DRP permits, which are not otherwise suspended and as to which timely challenges are required.

*C. The Third Cause of Action is Time-Barred by Government Code Section 65009*

In his third cause of action appellant alleges the City violated its Municipal Code with regard to the consideration, public notice and hearing process for consideration of the permit for the proposed project.<sup>11</sup> To the extent that appellant purports to challenge the City's May 14, 2014, land use decisions, he is independently barred from doing so by Government Code section 65009.

The City's May 2014, approval of the CUP and DRP aspects of the project, whether on CEQA-related or other grounds (e.g., compliance with the City's General Plan, LBMC or LCP) are clearly land use decisions. A challenge to a land use decision is immediately subject to judicial review, subject to the 90-day statute of limitations of Government Code section 65009. That statute provides that an action or proceeding to "attack, review,

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<sup>11</sup> To the extent this claim represents an effort to revive the first cause of action, it too is time-barred by section 21167, subdivision (d).)

set aside, void, or annul” a local agency’s decision as to a land use permit must be commenced within 90 days of that legislative body’s decision. (Gov. Code, § 65009, subd. (c)(1)(A).) “Upon the expiration of the time limits provided for in [this statute], all persons are barred from any further action or proceeding.” (Gov. Code, § 65009, subd. (e).)

The third cause of action attacks the validity of the Planning Commission’s May 14, 2014, decision to approve the project, including the CUP and DRP portions. Accordingly, appellant had 90 days to file an action challenging that Planning Commission decision, or until August 12, 2014. This action was filed in March 2015, several months after the statute of limitations expired. Strict adherence to the 90–day statute of limitations is in order so as to afford certainty to property owners and local governments in land use decisions. (See *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1125 [petition served 97 days after challenged decision; limitations period represents an “absolute time limit,” and an absence of prejudice or desire to address the case on its merits “does not permit avoidance of that statute’s mandatory nature”]; *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1048; *Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943, 950.)

Appellant does not contend in his opening brief that Government Code section 65009 does not apply in this action, and makes only a passing reference to the statute in his Reply. Nor does appellant address the fact that the trial court explicitly found that the third cause of action time-barred based on this statute. The underlying deficiencies cannot be cured; the third cause of action is time-barred.

II. *The Fourth Cause of Action for Declaratory and Injunctive Relief is Barred as a Matter of Law*

Appellant does not take issue with the bases for the trial court's ruling dismissing his claims for declaratory and injunctive relief. That is not surprising as those "claims" are barred as a matter of law.

As for the claim for declaratory relief, it is barred because the sole means to challenge the validity of the City's permit approvals is a petition for writ of mandate under Code of Civil Procedure section 1094.5. (See *State of California v. Superior Court* (1974) 12 Cal.3d 237, 249, 251; *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718.) An action for declaratory relief is not an appropriate vehicle by which to challenge an administrative decision (*Walter H. Leimert Co. v. California Coastal Com.* (1983) 149 Cal.App.3d 222, 231), even where the petitioner claims the agency failed to comply with the law. (*State of California v. Superior Court, supra*, 12 Cal.3d at p. 249.)

There is no stand-alone "cause of action" for injunctive relief. Injunctive relief is an equitable remedy which may only be requested incidental to an independently cognizable cause of action. (*Guessous v. Chrome Hearts, LLC* (2009) 179 Cal.App.4th 1177, 1187; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984.)

Appellant asserts that the trial court erred in dismissing his fourth cause of action in that it failed to address his assertion under section 30803, subdivision (a), which provides that any "person may maintain an action for declaratory and equitable relief to restrain any violation of this division, of a cease and desist order issued pursuant to Section 30809 or 30810, or of a restoration order issued pursuant to Section 30811."

The trial court did not address this argument because appellant did not raise it before this appeal.<sup>12</sup> In any event, the contention lacks merit. Section 30803 of the Coastal Act is a remedy which allows a private party to, among other things, enjoin a development undertaken in violation of a CDP or a threatened Coastal Commission cease and desist order. (§§ 30809-30811.) It is not a substitute for bringing a proper writ of mandate challenge to review an administrative decision on a CDP.

### **DISPOSITION**

The judgment dismissing the action against respondents City of Laguna Beach, Laguna Beach City Council, Laguna Beach Planning Commission and Anne Johnson is affirmed. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.

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<sup>12</sup> Appellant claims his argument regarding section 30803 was raised in opposition to City's demurrer. The record reflects otherwise.